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7 Attorneys for Defendant Ford Motor Company
8

9 **IN THE UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11 Karen Elliott, an individual,

12 Plaintiff,

13 v.

14 Ford Motor Company, a Delaware
15 Corporation, TRW Automotive Holdings
16 Corp., a Delaware Corporation; and Autoliv
17 Inc., a foreign corporation,

18 Defendants.

19 } No. CV 2004 0902 PHX SRB

20 } **FORD MOTOR COMPANY'S**
21 } **MOTION TO STRIKE**
22 } **PLAINTIFF'S EXPERT'S, MIKE**
23 } **SHEPSTON'S, REBUTTAL**
24 } **OPINIONS AND REPORT DATED**
25 } **SEPTEMBER 28, 2006**

26 } (Honorable Susan R. Bolton)

27 Ford Motor Company ("Ford") hereby moves to strike Plaintiff's Expert's, Michael
28 Shepston's, September 28, 2006 rebuttal opinions and report because:

29 (1) plaintiff has no good cause for ignoring this Court's order by failing to
30 timely disclose rebuttal opinions from plaintiff's accident reconstruction expert; and
31 (2) Mike Shepston's rebuttal report was untimely produced almost two months
32 after the rebuttal deadline of August 5, 2006.

33 This motion is supported by the accompanying Memorandum of Points and
34 Authorities.

35 DATED this 26th day of October, 2006.

36 BOWMAN AND BROOKE LLP

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10 **MEMORANDUM OF POINT AND AUTHORITIES**

11 **I. FACTUAL BACKGROUND**

12 On April 28, 2006, the parties filed a stipulation with the Court requesting an
13 extension of Ford's experts' reports' deadline to July 5, 2006 and extending the
14 rebuttal deadline to August 5, 2006. The parties also agreed to extend the
15 discovery deadline to September 28, 2006. Ford disclosed its experts and
16 produced their reports timely on July 5, 2006. Ford's experts, specifically Dr.
17 Carter, indicated in his report that he relied, in part, on Ford's crash tests conducted
18 by Dr. Carter on June 26 and 30, 2006. The crash tests reports were produced to
19 plaintiff on July 18, 2006. Plaintiff did not produce any rebuttal opinions or experts
20 on or before the rebuttal deadline of August 5, 2006. Three minutes before midnight
21 on September 28, 2006, plaintiff's counsel sent, via email, Mike Shepston's rebuttal
22 report. Mike Shepston's rebuttal opinions and report are untimely and contrary to
23 prior testimony and should be stricken.

24 **II. MIKE SHEPSTON'S REBUTTAL OPINIONS AND REPORT SHOULD BE**
25 **STRICKEN BECAUSE THEY ARE UNTIMELY IN VIOLATION OF THE**
26 **COURT'S ORDER**

27 Mike Shepston's rebuttal opinions and report should be stricken because
28 there is no good reason for the late disclosure. Mike Shepston's rebuttal report
indicates that the purpose of his supplement report is to respond to Ford's expert's
report, Dr. Carter, produced to plaintiff one month before the rebuttal deadline of
August 5, 2006. Indeed, the first line of Mike Shepston's rebuttal report states that

1 " [t]he following is a supplement to my report and is responsive to Jarrod Carter's
 2 report." See M. Shepston's supplemental report, attached as Exhibit A. M.
 3 Shepston's new opinions and rebuttal report were produced almost two months after
 4 the rebuttal deadline. Mike Shepston was aware of Dr. Carter's opinions on July 5,
 5 2006, and there is no good cause for not timely disclosing new opinions to rebut Dr.
 6 Carter's report. Indeed, Mike Shepston had all of Ford's experts' reports and Ford's
 7 crash tests reports and videos before the rebuttal deadline. Plaintiff disregarded
 8 this Court's deadlines and without the Court's permission filed a M. Shepston's
 9 report rebuttal report on September 28, 2006.

10 **III. MIKE SHEPSTON'S AFFIDAVIT SHOULD BE STRICKEN BECAUSE IT IS
 11 CONTRARY TO PRIOR TESTIMONY AND IS UNTIMELY**

12 Mike Shepston's rebuttal report incorporates by reference his affidavit
 13 ("Shepston's affidavit") dated September 12, 2006. This affidavit was prepared in
 14 response to Ford's motion for summary judgment. Ford moved to strike the affidavit
 15 in its motion to strike portions of plaintiff's statement of facts. Shepston's Affidavit
 16 should be stricken because it contains new and untimely opinions and is contrary to M.
 17 Shepston's prior testimony. Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266-67 (9th
 18 Cir. 1991); Foster v. Arcata Assoc., Inc., 772 F.2d 1453, 1462 (9th Cir. 1985). M.
 19 Shepston's affidavit states that it was prepared because of new information obtained
 20 from the removal of the bumper facia, this in fact is not true because Mike Shepston had
 21 already removed the bumper facia before his deposition and testified to the following on
 22 June 8, 2006:

23 Q. Did you consider anything you observed, measured, or
 24 learned at that inspection on June 26th that would affect
 25 your final opinions today?

26 Mr. Shumway: I think you have the wrong date.

27 Ms. Goldsmith: What date was it? I have May 26th.

28 The Witness: I absolutely considered it. Nothing changed my
 29 opinions.

1 Q.

Okay. So you actual[ly] have considered whatever you observed or measured or inspected on the 26th which was when the bumper cover was taken off the Elliott vehicle. Correct?

2 A. Yes.

3

4

5 See Deposition Transcript of Mike Shepston, pp. 12:18-13:7, attached as Exhibit B.

6 Contrary to his affidavit however, M. Shepston is well aware that the bumper removal

7 occurred long before the rebuttal deadline, it occurred on May 26, 2006, and he had

8 considered it and did not change his opinions. M. Shepston's affidavit also references

9 Ford's crash tests that were done on June 27 and 30, 2006, and produced before the

10 rebuttal deadline. M. Shepston did not timely rebut Ford's crash tests timely either.

11 The affidavit also references new opinions in regards to M. Shepston's inspection of

12 Ford's crash test vehicles. M. Shepston inspected these vehicles on August 2, 2006,

13 prior to the rebuttal deadline.

14 Indeed, all of M. Shepston's rebuttal opinions in his supplement report should

15 have been timely disclosed on or before the rebuttal deadline. Moreover, M. Shepston

16 references to Dr. Carter's deposition testimony and states that his opinions are still not

17 final because he has not had the opportunity to review Dr. Carter's deposition transcript.

18 However, M. Shepston had Dr. Carter's report since July 5, 2006; yet, M. Shepston did

19 not rebut any of Dr. Carter's opinions until his affidavit of September 12, 2006, to try to

20 assist plaintiff's counsel to overcome a motion for summary judgment. Plaintiff is

21 ignoring this Court's deadlines and intends on disclosing new opinions at plaintiff's will

22 with total disregard to the Court's Orders and without obtaining this Court's permission.¹

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28 ¹ At the hearing regarding Ford's motion for summary judgment and Ford's motion to exclude G. Mahon, on October 16, 2006, the Court ordered plaintiff to file a motion to request permission to supplement expert reports on or by October 27, 2006.

1 DATED this 26th day of October, 2006.
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2006 I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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